DOCKET FILE COPY ORIGINAL ORIGINAL

RECEIVED

JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

JOINT COMMENTS OF BELL ATLANTIC AND THE PACIFIC COMPANIES

Mark L. Evans
Alan I. Horowitz
Anthony F. Shelley
Miller & Chevalier
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorneys for the Joint Commentors

(Additional Counsel Listed On Signature Page)

January 25, 1993

Table of Contents

RECEIVED

JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

JOINT COMMENTS OF BELL ATLANTIC[1]
AND THE PACIFIC COMPANIES[2]

1. Introduction and Summary

As Congress recognized, the ability of competitors to obtain access to video programming on reasonable terms is "crucial to the development of competition to cable."[3] Absent an assured source of programming, other multichannel providers are unlikely to make the large investments necessary to deploy competing distribution systems. This is especially true for video dial tone providers, who currently must rely entirely on third parties to provide any programming transported over their networks.

---

1 The Bell Atlantic telephone companies ("Bell Atlantic") are The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac telephone companies, The Diamond State Telephone Company, and New Jersey Bell Telephone Company.

2 The Pacific Companies are Pacific Telesis Group, Pacific Bell and Nevada Bell.

3 See S. Rep. No. 102-92, 102d Cong., 1st Sess. 77 (1991) ("Senate Report").

Today, however, the cable industry controls both the delivery and content of video programming, and cannot be counted on to provide the programming needed to support development of video dial tone.[4] On the contrary, cable has used its control of programming to impede the development of competing distribution systems by denying access to cable-owned programming, or by providing access on unfavorable, discriminatory terms.[5] Cable operators have also impeded the development of independent programming sources by denying access to their monopoly cable systems, or by extracting ownership interests in exchange for carriage.[6]

Video dial tone providers, therefore, must rely heavily on competing multichannel distributors as a source of programming to transport over their networks, and the ability of these distributors to obtain access to programming on reasonable, non-discriminatory terms is critical to the development of video

---

4 In general, cable operators will not even consider using an advanced telephone network to deliver their programming unless they are guaranteed exclusive programming rights. In New Jersey, for example, Bell Atlantic invited all the cable operators in the state to use its network, but only one existing cable operator has agreed to do so to date.

5 E.g., Competition, Rate Regulation and the Commission's Policies Relating to the Provision of Cable TV Service, MM Dkt No. 89-600, Report at 60-66 (released July 31, 1990); NTIA, The NTIA Infrastructure Report: Telecommunications in the Age of Information at 239 (Oct. 1991).

6 Id.; see also H.R. Rep. No. 628, 102d Sess. at 41 (1992) ("House Report") ("vertically integrated [cable] companies reduce diversity in programming by threatening the viability of rival cable programming services").

dial tone.[6] Absent Commission rules strictly enforcing the program access provisions of the 1992 Cable Act, however, the cable incumbents will be able to continue using their control over programming to impede the development of competing distribution systems, including video dial tone.

2. The Commission Must Prohibit Practices That Cable Operators Have Used To Impede Competition

By adopting the 1992 Act's program access provisions, Congress expressly sought to promote competition and to spur the development of competing distribution technologies.[7] It did so in two ways.

First, Congress enacted a general prohibition against the use of any "unfair methods of competition or unfair or

---

[6] Under the Act, a "multichannel video programming distributor" is an entity that provides programming directly to subscribers. 47 U.S.C. § 522(12) ("a person...who makes available for purchase, by subscribers or customers, multiple channels of video programming"). This includes any entity that provides programming over a common carrier video dial tone network.

[7] See, e.g., 47 U.S.C. § 547(a) ("The purpose of this section is to promote the public interest ... by increasing competition and diversity in the multichannel video programming market ... and to spur the development of communications technologies"); H. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 93 (1992) ("Conf. Report") (directing the Commission to adopt rules to "resolve the problems of unreasonable cable industry practices," and to "encourage arrangements which promote the development of new technologies providing facilities-based competition to cable....").

deceptive acts or practices."[8] Under this provision, the Commission has broad authority to prohibit any acts or practices the "purpose or effect of which is to hinder significantly or to prevent any multichannel programming distributor from providing ... programming to subscribers or consumers."[9]

Second, in addition to this general prohibition, Congress identified specific practices that it concluded the cable industry has used to impede competition, and that the Commission -- "[a]t a minimum" -- must prohibit.[10] These specific practices are per se unlawful, and no "threshold"

---

[8] 47 U.S.C. § 547 (b). This prohibition applies to all cable operators, as well as satellite cable programming vendors in which a cable operator has an "attributable interest," and satellite broadcast programming vendors. Id. In defining an "attributable interest," the Commission should use the same standard that it adopts for its telco-cable rules. See 47 C.F.R. § 63.54(e) (reconsideration pending). In both instances, the Commission's rules seek to define a threshold below which another entity will not control a programmer's actions, see NPRM at 6-7, and it cannot arbitrarily apply a stricter standard to telephone companies than to cable operators. If anything, the Commission must apply a stricter standard to cable operators, since the 1992 Act bars cable operators from exercising "influence" over a programmer, whereas its cable-telco rules bar only "ownership or control."

[9] 47 U.S.C. § 547(c). For example, under this provision it would be unlawful for incumbent cable operators to enter into exclusive contracts with owners of multi-tenant buildings since these contracts would foreclose access to competitors.

[10] 47 U.S.C. § 547(c); see also Conf. Report at 92 ("the regulations must prevent" and "prohibit" the specific practices); House Report at 43 ("the legislation requires the FCC to promulgate rules to prohibit" the specific practices).

showing of harm can be required to establish a violation of the Act.[11] Three specific practices must be prohibited.

a. The Commission must adopt rules to prevent undue or improper influence.

Under the Act, the Commission must establish rules "to prevent a cable operator" from "unduly or improperly influencing" a programmer's decision to sell, or the prices, terms and conditions of sale, to any unaffiliated multichannel distributor.[12]

In implementing the statutory mandate, the Commission should make clear that its rules prohibit any conduct which influences a programmer's decision to sell to the detriment of a competing distributor. In particular, a cable operator should fail this standard whenever it attempts to persuade a programmer not to sell programming to distributors with whom it competes or to sell at higher rates or subject to disadvantageous terms and conditions.[13]

---

[11] See NPRM at 7.

[12] 47 U.S.C. § 547(c)(2)(A). The programmers covered by this section include satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors. Id.

[13] This is especially true when a cable operator attempts to "persuade" by refusing, or threatening to refuse, carriage on its cable system, or by threatening to withdraw financial support or otherwise impede a programmers' ability to obtain funding.

b. The Commission must adopt rules to prohibit discrimination.

In addition, the Commission must "prohibit discrimination ... in the prices, terms, and conditions of sale or delivery of" video programming "among or between cable systems, cable operators, or other multichannel video programming distributors."[14]

In determining whether unlawful discrimination has occurred, the Commission should use a standard similar to section 202(a) of the Communications Act, which prohibits "unjust or unreasonable discrimination" or giving an "unreasonable preference or advantage" to any person.[15] This standard incorporates an existing body of law to help guide the conduct of cable operators, and gives the Commission a familiar standard for use in resolving disputes.[16] It also allows for precisely the

---

[14] 47 U.S.C. § 547(c)(2)(B). This provision also applies to satellite cable programming vendors in which a cable operator has an attributable interest, and to satellite broadcast programming vendors. Id.

[15] 47 U.S.C. § 202(a).

[16] The Commission should not, however, permit a pre-established differential in the prices charged to competitors, see NPRM at 12; creating such a safeharbor would guarantee that competitors are always discriminated against by a pre-established amount. In addition, the Commission should not limit itself to the discrimination standards under the antitrust laws, see NPRM at 13-14; Congress sought here to affirmatively promote competition and not just reenact the antitrust laws, see supra n. 6. Also, the legal standard that applies under the antidumping laws, see NPRM at 14, is in dispute and would provide little guidance to cable operators or the Commission, see Color TV Receivers From The Republic of Korea, 56 Fed. Reg. 12701, 12702 (1991).

types of cost and volume based differentials that are permitted under the 1992 Act.[17]

c. The Commission must adopt rules to prohibit exclusive contracts.

The Commission must also prohibit "exclusive contracts" and other "practices, understandings, arrangements, and activities" between a cable operator and an affiliated programmer that prevent a competing distributor from obtaining programming.[18] The only exception is that, in areas already served by cable, the Commission can make exceptions for individual contracts that it determines to be "in the public interest."[19]

Under the Act, the Commission's rules must, as a general rule, prohibit all exclusive contracts within the scope of the statute. Exceptions can be made only where cable operators show, in advance, that individual contracts are in the public interest.[20] In order to give effect to Congress's

---

[17] The Act permits differentials based on "actual and reasonable differences in...cost," or "economies of scale, cost savings, or other legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." 47 U.S.C. § 547(c)(2)(B).

[18] 47 U.S.C. § 547(c)(2)(C), -(D).

[19] Id., § 547(c)(2)(D).

[20] The Act requires an individualized determination that "an exclusive contract is in the public interest," after considering the effect of each "such contract on the distribution of video programming." 47 U.S.C. § 547(c)(4).

injunction to prevent cable operators from using exclusive contracts to impede competition,[21] a cable operator should bear a heavy burden in making the required public interest showing.

d. The Commission must also adopt rules governing cable carriage agreements.

In addition to its program access provisions, the Act also seeks to promote competition by preventing the practices that have been used by cable operators to impede the development of independent programming sources.

As a result, the Commission is directed to establish rules "governing program carriage agreements and related practices" between cable operators (or other multichannel distributors) and video programmers.[22] Under the Act, these rules -- at a minimum -- must (1) prevent a cable operator from requiring a financial interest in a programmer as a condition for carriage; (2) prohibit a cable operator from "coercing" exclusive rights from a programmer and from "retaliating" for not providing such rights; and (3) prevent a cable operator from discriminating in favor of an affiliated programmer in the selection, terms, or conditions for carriage.[23]

---

[21] Senate Report at 28 (cable operator's use exclusive contracts to "establish a barrier to entry and inhibit the development of competition in the market").

[22] 47 U.S.C. § 536(a).

[23] Id.

3. **The Commission Must Establish Procedures to Strictly Enforce Its New Rules**

The types of activities that Congress has directed the Commission to prohibit are rarely committed openly, and are not readily susceptible to proof by an aggrieved complainant. As a result, the Commission will succeed in giving effect to Congress's intention to promote competition only if, in addition to prescribing the substantive standards for determining whether particular practices are unlawful, it establishes procedures that permit its new rules to be strictly enforced.

First, because of the severe problems of proof that will be encountered by a complainant, the Commission should adopt an "effects" test similar to that used under other federal discrimination statutes.[24] Specifically, whenever a complainant makes a prima facie showing of disparate treatment -- that it has been unable to obtain programming available to cable operators or has been subjected to less favorable terms -- a presumption should arise that this disparity is the effect of a violation of

[24] Under the employment discrimination statutes, for example, it is also difficult to establish that an act is the result of discrimination. As a result, a complainant need only make a prima facie showing of disparate treatment (e.g., that he or she is a member of a racial minority, has the necessary qualifications, and was denied a position) to give rise to a presumption that a hiring decision was the effect of discrimination, and to shift the burden to the employer to demonstrate "some legitimate, nondiscriminatory reason for the employee's rejection." See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 797, 802 (1973); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

the Commission's rules. The burden should then rest with the cable operator to prove a legitimate reason for the disparate treatment.

Second, the Commission should require cable operators to publicly disclose, through informational filings with the Commission, the rates, terms, and conditions under which they obtain programming.[26] Absent such a requirement, the Commission's complaint procedures will be meaningless because competing distributors will have no way of knowing whether they are being subjected to unfavorable terms.

Third, in addition to awarding damages and any other relief to complainants,[27] the Commission should make clear that it intends to use its authority to order fines[28] and

---

[26] Disclosure of all the terms under which cable operators obtain programming are necessary in order to prevent non-price discrimination. For example, non-price discrimination could take the form of differences in the timing that programming is provided to cable operators and competing distributors, blacking out portions of the programming provided to competing distributors, or providing cable operators more local advertising time -- and consequently more revenues from advertising sales -- than is provided to competing distributors.

[27] 47 U.S.C. § 548(e) (providing the Commission with "power to order appropriate remedies, including if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel programming distributor").

[28] 47 U.S.C. § 502 (subjecting a person who "willfully and knowingly" violates the Commission's rules to "a fine of not more than $500 for each and every day during which such offense occurs").

forfeitures[29] against violators of its rules in order to deter unlawful conduct from occurring.

CONCLUSION

The Commission should promote competition in the distribution and production of video programming by adopting rules to strictly enforce the 1992 Cable Act's program access and cable carriage provisions.

Respectfully submitted,

Mark L. Evans
Alan I. Horowitz
Anthony F. Shelley
Miller & Chevalier
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorneys for the Joint Commentors

Edward D. Young, III
John Thorne
Of Counsel

Michael E. Glover
1710 H Street, N.W.
Washington, D.C. 20006
(202) 392-1082

Attorneys for the Bell Atlantic Telephone Companies

[29] 47 U.S.C. § 503(b)(1), -(2) (subjecting cable operators who "willfully or repeatedly" violate the Commission's rules to a "forfeiture penalty" of up to "$25,000 for each violation or each day of a continuing violation").

James P. Tuthill
Lucille M. Mates
140 New Montgomery Street
San Francisco, Calif. 94105
(415) 542-7654

Alan F. Ciamporcero
1275 Pennsylvania Ave, N.W.
Washington, D.C. 20004
(202) 383-6416

Attorneys for the Pacific Companies

January 25, 1992